



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Application of California-American Water Company (U 210 W) to Decrease Revenues for Water Service in its Coronado District by (\$73,100) or (0.46%) in 2008 and Increase Revenues by \$266,200 or 1.67% in 2009 and \$260,900 or 1.61% in 2010	A.07-01-036
Application of California-American Water Company (U 210 W) to Increase Revenues for Water Service in its Larkfield District by \$1,272,000 or 61.91% in 2008, \$134,300 or 3.94% in 2009 and \$129,900 or 3.67% in 2010 Under the Current Rate Design or Decrease Revenues by (\$742,200) or (36.12%) in 2008 and Increase Revenues by \$50,000 or 3.72% in 2009 and \$63,500 or 4.55% in 2010 Under the Proposed Rate Design	A.07-01-037
Application of California-American Water Company (U 210 W) to Increase Revenues for Water Service in its Sacramento District by \$8,966,900 or 33.89% in 2008, \$1,905,700 or 5.36% in 2009, and \$1,860,700 or 4.97% in 2010 Under the Current Rate Design or by \$10,981,000 or 41.50% in 2008, \$1,925,900 or 5.11% in 2009, and \$1,845,600 or 4.66% in 2010 Under the Proposed Rate Design	A.07-01-038
Application of California-American Water Company (U 210 W) to Increase Revenues for Water Service in its Village District by \$1,537,300 or 7.43% in 2008, \$243,400 or 1.08% in 2009, and \$232,900 or 1.02% in 2010	A.07-01-039

**CALIFORNIA-AMERICAN WATER COMPANY'S
MOTION TO STRIKE THE REPLY BRIEF OF
THE MARK WEST AREA COMMUNITY SERVICES COMMITTEE**

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July 11, 2007

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I. INTRODUCTION

Pursuant to Rule 11.1 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), California-American Water Company (“California American Water”) hereby submits this motion requesting that the Commission strike the *Reply Brief of the Mark West Area Community Services Committee* (“MWACSC”), filed on July 3, 2007 (“Reply Brief”).

As set forth below, MWACSC's Reply Brief violates the Commission's Rules of Practice and Procedure and fundamental principles of fairness because it impermissibly introduces new testimony that is not part of the record and has not been tested through cross-examination, contains expert opinions on topics MWACSC's witness is not qualified to offer expert advice, makes conclusory opinions that are not supported by the record, and discloses confidential settlement communications. While the parties to this proceeding committed substantial time and resources to develop a record on which the Commission can base a decision, MWACSC waited to introduce new testimony until this point in the proceeding at which parties would be unable to respond to its new factual claims.

MWACSC's failure to comply with the Commission's Rules of Practice and Procedure is by no means an isolated incident. On June 28, 2007, MWACSC filed a document titled Opening Brief of the Mark West Area Community Services Committee ("Opening Brief"), which flouts the Commission's Rules concerning briefing, improperly relies upon inadmissible evidence to support its conclusory opinions, and reveals MWACSC's repeated disregard for the Commission's Rules. On July 3, 2007, California American Water filed its Motion to Strike MWACSC's Opening Brief, which is still pending before the Commission.

Furthermore, despite the clear admonishment to MWACSC and its representatives not to introduce, mention or refer to any evidence obtained as a result of the settlement discussions in this proceeding for any purpose other than settlement, MWACSC has again disclosed confidential information obtained through settlement negotiations between DRA, California American Water and MWACSC in this proceeding. This is the **third** time MWACSC

has submitted a document improperly disclosing confidential settlement communications, in overt violation of the Commission's Rules of Practice and Procedure.¹

The Commission should strike the Reply Brief in its entirety because it fails to comply with the Commission's Rules of Practice and Procedure and principles of fundamental fairness. Should the Commission decline to strike the entire Reply Brief, the Commission should at a minimum strike from the record the offending portions of the Reply Brief described below.

II. MWACSC'S REPLY BRIEF SHOULD BE STRICKEN IN ITS ENTIRETY

A. The MWACSC Reply Brief is an Improper Vehicle to Introduce New Information That is Not Part of the Record.

The Commission should reject this attempt by MWACSC to submit new evidence at this point in the proceeding. MWACSC had ample opportunity to present evidence, put on testimony, and cross-examine multiple witnesses in evidentiary hearings before this Commission.² Notwithstanding the many opportunities to present and dispute evidence in this proceeding, MWACSC now improperly seeks to supplement the record with information in a manner that would enable it to avoid having to substantiate its claims. By introducing new testimony at the last minute in this proceeding, MWACSC will preclude parties from either

¹ On May 4, 2007, MWACSC served testimony which improperly disclosed the substance of the confidential settlement negotiations between DRA, California American Water and MWACSC in this proceeding. In response to the motion filed by California American Water on May 17, 2007 to strike MWACSC's testimony, the Administrative Law Judge ruled to strike portions of the document containing confidential settlement communications and materials going beyond the scope of California American Water's rate case request. On June 28, 2007, MWACSC filed its Opening Brief, which also improperly disclosed the substance of the confidential settlement negotiations between DRA, California American Water and MWACSC in this proceeding. On July 3, 2007, California American Water filed its Motion to Strike the Opening Brief, which is still pending.

² Evidentiary hearings were held on June 4 through June 6, 2007. Although MWACSC did not attend the evidentiary hearing held on June 5, 2007 MWACSC's representatives were provided ample opportunity to conduct cross-examination of California American Water and the Division of Ratepayer Advocates (DRA) witnesses in this proceeding and they questioned several California American Water witnesses during two of the three days of evidentiary hearing.

testing the accuracy and validity of that testimony through cross-examination or responding to it through rebuttal testimony or briefing.

By way of example, beginning at page 8 of its Reply Brief, MWACSC provides its so-called “Analysis of Water Supply” for the year 2007, based upon its own recalculations of California American Water’s water supply analysis. MWACSC also submits factual claims that California American Water can simply change the pumping level assumptions in its 2004 Operations Plan to derive an excess water supply in the Larkfield District. MWACSC was fully aware of California American Water’s water supply analysis and made a tactical decision not to present its “analysis” to the Commission at an earlier date. MWACSC had the opportunity to present evidence regarding California American Water’s 2004 Operations Plan prior to and during the evidentiary hearing, but chose not to. MWACSC’s attempt to now inject its brand new testimony into the record at the last minute is wholly inappropriate and should not be tolerated by this Commission.

Similarly, on page 12 of the Reply Brief, MWACSC introduces new testimony regarding the Maximum Day Demand and Maximum Day to Average Day factor applied in California American Water’s supply analyses. MWACSC proposes that California American Water’s supply analyses should be recalculated using a **different** factor, even though MWACSC acknowledges that the factor is based upon actual, historical data.³ Again, the Commission must not tolerate MWACSC’s attempts to use untested evidence in a manner that would enable it to avoid having to substantiate its claims.

³ MWACSC Reply Brief, p. 12.

In short, the Reply Brief is an improper attempt to introduce information that is not part of the record and has not been proven to be accurate or legitimate.

B. MWACSC Overtly Violated the Commission's Rules by Disclosing in Its Reply Brief Confidential Information Obtained through Settlement Negotiations.

Through the course of this proceeding, representatives for California American Water, DRA and MWACSC have met on numerous occasions for settlement negotiations regarding the Larkfield and Sacramento Districts. At the beginning of each meeting, counsel for California American Water stated that all matters discussed at the meeting were confidential pursuant to Rule 12.6 of the Commission's Rules of Practice and Procedure.⁴ Despite the fact that representatives from MWACSC attended these negotiations and agreed that all settlement communications are confidential and not to be used for any purpose other than settlement, MWACSC's Reply Brief flagrantly violates the Commission's rules by disclosing confidential settlement communications. For example, MWACSC claims that California American Water is asking customers to pay \$37,500 annually for a conservation program,⁵ when this proposed allowance is not part of California American Water's rate case request, but rather is the amount communicated in confidential settlement negotiations. In addition to the fact that it is wholly inappropriate to disclose the contents of the confidential settlement negotiation, there is nothing in the record to support this claim. Similarly, MWACSC's attempt to introduce information

⁴ California law is clear that settlement communications are inadmissible evidence based upon the strong public policy in favor of settlement discussions and the integral role that confidentiality plays in the settlement process. (See Rule 12.6; Evid. Code § 1119.)

⁵ MWACSC Reply Brief, p. 11.

discussed during negotiations in the prior settlement negotiations regarding the North Wikiup Tank No. 2 is improper and should be stricken.⁶

At a bare minimum, the Commission should strike the portion of the Reply Brief referring to confidential settlement negotiations from this and prior rate cases.

C. The Commission Should Strike MWACSC’s Expert Opinions Because MWACSC’s Witness is a Non-Expert Who is Not Qualified to Offer Expert Advice.

The MWACSC Reply Brief contains multiple expert opinions on topics MWACSC’s witness is not qualified to offer expert advice. Without any expertise in seismic engineering standards, MWACSC draws numerous conclusions regarding California American Water’s engineering design of the North Wikiup Tank No. 2. For example, MWACSC contends that “[o]ne gets an entirely **different impression** of the adequacy of the design by reading the Zinn Geology Seismic Shaking Hazards Shaking Analysis. ... **A different impression** is also gained by reading the Final Basis of Design Report (BODR) prepared by RBF Consulting.”⁷ The impressions and opinions of MWACSC’s witness should be given no weight because he has no expertise in the complex seismic and environmental issues involved in the North Wikiup Tank No. 2.

⁶ MWACSC Reply Brief, p. 14 (claiming that “the existence of the earthquake fault at that site was not revealed during settlement negotiations for rate case A.04-04-041 in which the tank was initially approved.”).

⁷ MWACSC Reply Brief, p. 15 (emphasis added to original).

Throughout its Reply Brief, MWACSC opines at great length on the effects of conservation efforts on the water supply deficit in the Larkfield District, but MWACSC's witness showed no qualifications whatsoever to be deemed an expert on such issues.⁸

Finally, MWACSC's witness had limited knowledge of the water planning conducted by California American Water in the Larkfield District and the Commission should disregard MWACSC's attempt to provide expert opinions on how California American Water should modify the operation of its wells, for example. Again, the opinions rendered by a non-expert about the technical planning analysis for California American Water's water supply with no experience in water supply planning and hydro geological conditions have little or no value in this proceeding.

D. MWACSC's Reply Brief Relies on Opinions Rather than the Facts in This Proceeding.

MWACSC submitted a document consisting of opinion, speculation and conjecture, rather than facts and evidence supporting its position. Notably missing from the Reply Brief are references to evidence supporting MWACSC's opinions. MWACSC's Reply Brief contains only a handful of references to "testimony" that allegedly support MWACSC's statements and claims. In those instances where MWACSC actually provides a citation to the transcript of the evidentiary hearing, MWACSC fails to provide proper citations, in direct violation of Rule 13.11, which requires citations to the transcript in a proceeding to "indicate the transcript page number(s) and identify the party and the witness sponsoring the cited testimony."

⁸ RT 521:25-522:8 (Bouler/MWACSC).

MWACSC's lack of citations in the Reply Brief to testimony is indicative of its reliance upon speculation and opinion rather than record evidence.

It would be nearly impossible to enumerate each instance of MWACSC's reliance on opinions rather than facts in this proceeding. Instead, California American Water highlights some of the most egregious portions of the Reply Brief:

For example, MWACSC concludes that "[e]ven if a 400 gpm well is added the required filtration capacity would be only 901 gpm **or about ¾ of the capacity of the plant.**"⁹ MWACSC's conclusion is not based upon fact, but rather its speculation regarding the capacity of the Larkfield Water Treatment Plant. No facts or evidence of the existing capacity of the Larkfield Water Treatment Plant are presented to support MWACSC's conclusions.

Similarly, MWACSC's claim that the North Wikiup Tank No. 2 may fail in a seismic event is not supported by factual evidence and is highly speculative. Without any analysis of the design and construction of the North Wikiup Tank No. 2, MWACSC erroneously concludes that the Commission should be concerned about the safety of the tank simply because it is allegedly in "very close proximity of an active earthquake fault."¹⁰

The MWACSC Reply Brief also contains numerous conclusions regarding the effects of conservation on the water supply deficit in the Larkfield District that amount to nothing more than speculation that is unsupported by any record evidence. For example, MWACSC illogically concludes that conservation can be used to reduce water supply needs

⁹ Reply Brief, p. 13 (emphasis added to original).

¹⁰ MWACSC Reply Brief, p. 19.

during peak demand because “Peak Demand periods **should be** the time when conservation is most effective.”¹¹ What should be the most effective time for water conservation (peak demand) to take place is not necessarily when customers actually choose to conserve water.

The Commission should afford no weight to the unsupported and conclusory opinions in MWACSC’s Reply Brief.

III. CONCLUSION

All parties participating in the Commission’s proceedings, whether represented by counsel or not, do so under the rules specified in the Commission’s Rules of Practice and Procedure. It would be unfair to effectively change these rules by failing to apply the rules evenhandedly, particularly when this is the **third** time in the proceeding that MWACSC has violated the Commission’s procedural requirements. For all of the reasons discussed above, California American Water requests that the Commission strike the MWACSC Reply Brief in its entirety. Should the Commission decline to strike the entire MWACSC Reply Brief, California American Water requests that the Commission at a minimum, strike the offending portions of the Reply Brief described in this Motion.

¹¹ MWACSC Reply Brief, p. 10.

Dated: July 11, 2007

Respectfully submitted,

By: /s/ Sarah E. Leeper

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PROOF OF SERVICE

I, Michelle Chavez, declare as follows:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is STEEFEL, LEVITT & WEISS, One Embarcadero Center, 30th Floor, San Francisco, California 94111-3719. On July 11, 2007, I served the within:

California-American Water Company's Motion to Strike the Reply Brief of the Mark West Area Community Services Committee

on the interested parties in this action addressed as follows:

See attached service list

- (BY ELECTRONIC SERVICE)** By transmitting an electronic notice of the availability of such document(s) on a FTP (file transfer protocol) site electronically from Steefel, Levitt & Weiss, San Francisco, California, to the electronic mail addresses listed below. I am readily familiar with the practices of Steefel, Levitt & Weiss for transmitting electronic mail. Said practice also complies with Rule 1.10 of the Public Utilities Commission of the State of California and all protocols described therein.
- (BY PERSONAL SERVICE)** By causing such envelope to be delivered by hand, as addressed by delivering same to **SPECIALIZED LEGAL SERVICES** with instructions that it be personally served.
- (BY MAIL)** By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Steefel, Levitt & Weiss, San Francisco, California following ordinary business practice. I am readily familiar with the practice at Steefel, Levitt & Weiss for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 11, 2007, at San Francisco, California.

/s/ *Michelle Chavez*

Michelle Chavez

SERVICE LIST

A. 07-01-036, A. 07-01-037, A. 07-01-038, A. 07-01-039

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